84-674

No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

JOHN NAPOLI,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

MARTIN G. WEINBERG,
Counsel of Record,
KIMBERLY HOMAN,
OTERI, WEINBERG & LAWSON,
75 Blossom Court,
Boston, Massachusetts 02114.
(617) 227-3700

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

30pp

Questions Presented for Review.

I. Whether this Court should resolve the division of standards amongst the federal circuit courts and determine the circumstances which mandate the granting of severance by the trial court when a defendant seeks to testify as to some counts of an indictment but concommitantly to assert his Fifth Amendment privilege against self-incrimination as to the other counts of the indictment at trial.

II. Whether where an undercover Drug Enforcement Administration agent represented himself as a trafficker in illicit drugs and expressly disclaimed connection with the United States, knowledge of the governmental ownership of the money in question is or is not an essential element for conviction of a violation of 18 U.S.C. § 641, or alternatively, whether under these circumstances, the exercise of federal jurisdiction is impermissible.

Table of Contents.

Table of Authorities Cited.

CASES.

OTHER PROVISIONS.

No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

JOHN NAPOLI,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioner John Napoli prays that this Honorable Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 13, 1984.

Opinions Below.

Petitioner's appeal was heard by a panel of the Second Circuit which issued an unpublished opinion affirming petitioner's conviction on July 13, 1984, which opinion is reproduced herein in the Appendix at 2a-4a. On August 29, 1984, the Court denied petitioner's timely petition for rehearing, see Appendix at 1a.

Jurisdiction.

The judgment below was entered on July 13, 1984, and a petition for rehearing was denied on August 29, 1984.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property to be taken for public use, without just compensation.

18 U.S.C. § 641 provides:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted —
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

Federal Rule of Criminal Procedure 14 provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at trial.

Statement of the Case.

After a jury trial in October, 1983, petitioner was convicted of receiving stolen government money under 18 U.S.C. § 641, distributing heroin under 21 U.S.C. § 841(a)(1), and conspiracy to commit these offenses under 18 U.S.C. § 371 and 21 U.S.C. § 846, respectively. Judgment entered on January 20, 1984.

The evidence at trial portrayed a quintessential "rip-off" scheme.[1] On August 24, 1982, co-defendant Frank Guglielmini telephoned petitioner Napoli and one Gary Francione to enlist their assistance. As the three men drove to a pre-arranged meeting with the proposed dupes, Guglielmini explained to Napoli and Francione that he needed their help in "ripping off" one Alvin Kotz, who had failed to pay Guglielmini money owed to him. His plan contemplated presenting Napoli and Francione to Kotz as narcotics dealers to set the stage for a sham drug transaction in which Kotz would be relieved of the monies produced by him to finance his end of the deal without the corresponding delivery of narcotics, which were to be promised but not produced.

Unknown to the plotters, Kotz was a confidential informant for the Drug Enforcement Administration, working with Special Agent Dannie West, who was present with Kotz at the August 24 meeting, assuming the identity of a prospective narcotics purchaser ("Danny"). The conversation at the meeting revolved around the proposed sale of heroin to "Danny" by Napoli and Francione.

As a result of this meeting and several subsequent telephone conversations, a meeting was arranged at Newark Airport for the purported sale of one-half kilogram of heroin to "Danny" for

[1] The unpublished opinion of the Court of Appeals contains no statement of facts. Accordingly, petitioner sets forth herein a brief statement of the facts necessary to the issues presented.

$120,000 on August 26, 1982. On that date, "Danny" met with Francione in the former's automobile to negotiate whether the putative heroin and the money would be exchanged simultaneously or whether the money would be paid first, with delivery to follow thereafter. Upon seeing Napoli standing inside the terminal a short distance away, "Danny" agreed to give Francione the cash[2] with the understanding that Francione would transfer the money to Napoli and return with the narcotics. Francione left "Danny's" automobile with the money and walked toward the terminal. At this crucial juncture, Agent West's attention was diverted by the arrival of a marked police car which pulled up behind his vehicle with sirens blaring. When Agent West had recovered his composure sufficiently to seek out Napoli and Francione, he was unable to locate them.

In a series of telephone conversations which followed this meeting, Napoli told "Danny" that Francione had fled the scene upon observing the police vehicle apparently heading toward "Danny's" automobile; in a subsequent conversation, Napoli, according to the government, informed "Danny" that Francione's temporary scarper had matured into a permanent one, involving both the money and the heroin destined for "Danny". In light of the compromising position in which his confederate's defalcation had placed him, Napoli told "Danny" that he would supply a full kilogram of heroin upon payment of only an additional $60,000. The purported willingness of Danny to once again part with his money without seeking to test the subject of the transaction, coupled with the rousing success of the earlier scam, apparently inspired the parties to repeat the ploy.

On September 1, 1982, Napoli and "Danny" arranged to meet in Brooklyn to effect the transfer. For this purpose, Napoli had prepared a "dummy" package, i.e., one containing a legal

---

[2] $120,000 withdrawn from the D.E.A. cashier.

heroin look-alike. On route to the appointed meeting, Agent West observed Napoli at a public telephone booth a few blocks from the meeting site. "Danny" confronted Napoli with a gun prominently displayed in his waistband and with an apparent confederate nearby. Napoli and "Danny" drove, at Napoli's request, to a nearby diner where Napoli excused himself to make a telephone call and then told "Danny" that he was compelled to leave immediately to "meet his people".

Leaving "Danny" at the diner, Napoli proceeded in "Danny's" automobile to meet with one George Downes. He telephoned "Danny" at the diner and declined to carry the transaction further as Danny was armed and not alone. He further informed Kotz that for these reasons, and also because "Danny" now insisted upon testing a sample prior to parting with his money, the deal was off, and also relayed this information to Francione. Francione volunteered to supply a substance which would test positively for heroin [3] to be presented as a sample. Reluctantly, Napoli agreed to proceed and, following another series of telephone conversations between Napoli and "Danny", it was agreed that Napoli would send someone to meet "Danny" with a sample. Accordingly, Downes delivered to "Danny" a small aluminum foil packet, which had been supplied by Francione; the field test performed upon the substance contained therein indicated positive for heroin.[4] Thereafter, "Danny" expressed his satisfaction with the sample to Napoli by telephone, requesting delivery of the complete package. Downes returned to "Danny" with a package of powder which was duly exchanged for $60,000.[5] As soon as Downes

[3] Evidence was adduced at trial that the Marquis Reagent Test, the usual device for field-testing narcotics, will also indicate a positive result for substances other than illegal narcotics, many of which may be purchased over the counter in any drugstore.

[4] Subsequent laboratory testing by a D.E.A. chemist indicated that the substance did contain heroin.

[5] Also withdrawn from the D.E.A. cashier.

left the scene, Agent West field-tested the substance in the package and obtained a negative indication. Nevertheless, Napoli was arrested shortly thereafter and upon his person was found currency the serial numbers of which matched those belonging to a portion of the initial $120,000 with which Francione had absconded.

Prior to trial, Napoli moved to dismiss the § 641 counts on the ground that the government's deliberate deception and disguise regarding the provenance of the funds rendered a § 641 prosecution impermissible. He also requested that the jury be instructed that Napoli could not be convicted absent proof of knowledge that the money involved was the property of the United States government, which request was denied. Prior to trial, and renewed during trial, Napoli also moved to sever the § 641 counts from the narcotics counts on the basis of his need to testify as to the narcotics counts and his correspondingly compelling need not to testify as to the money counts. The motion was denied, and Napoli testified at trial in a manner which exculpated himself on the drug counts but which necessarily inculpated himself on the money counts, precisely the quandary which had been placed before the trial judge. Substantial terms of imprisonment were imposed on all counts.

Reasons Why the Writ Should be Granted.

I. THIS COURT SHOULD RESOLVE THE DIVISION OF STANDARDS AMONGST THE FEDERAL CIRCUIT COURTS AND DETERMINE THE CIRCUMSTANCES WHICH MANDATE THE GRANTING OF SEVERANCE BY THE TRIAL COURT WHEN A DEFENDANT SEEKS TO TESTIFY AS TO SOME COUNTS OF AN INDICTMENT BUT CONCOMMITANTLY TO ASSERT HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AS TO THE OTHER COUNTS OF THE INDICTMENT AT TRIAL.

The quandary in which petitioner was placed here was palpable and patently prejudicial. Confronted with the spectre of

joint trial on charges of receiving stolen government monies and distribution of heroin, Napoli was faced with a dilemma of immense proportion: whether to remain silent as to all counts and suffer the attendant consequences or whether to effectively concede his guilt as to the money counts in the course of explaining the nature and scope of the planned "rip-off", an inescapable concommitant of his disavowal of any intention to distribute narcotics and, indeed, even of knowledge that the sample actually did contain heroin. Napoli's defense to the narcotics counts, which met the government's proof completely and consistently, was that he never possessed the requisite knowledge or intent to distribute narcotics but, on the contrary, his intent was merely to perform a credible charade bearing convincing indicia of a contemplated drug transaction to lull the intended victims into unsuspectingly parting with their money without actual delivery of narcotics, either through negotiating advance payment or, failing that, the provision of a non-narcotic substitute.[6] The indefensible Hobson's choice, which the refusal to sever created, entirely vitiated the petitioner's Fifth Amendment protection against self-incrimination.

The Circuit Courts of Appeals have not developed a definitive and consistent approach to this troublesome question. Indeed, three analytically distinguishable treatments are evident, which fail even of internal consistency within each circuit. Some courts treat the matter simply as one of judicial discretion under Fed. R. Crim. P. 14, and have accordingly limited their review to determination of whether that discretion has been abused, without adverting to the Fifth Amendment implications. See, e.g., *United States* v. *Reicherter*, 647 F.2d 397 (3d Cir. 1981); *United States* v. *Werner*, 620 F.2d 922 (2d

[6] Petitioner testified at trial that he believed that the sample packet provided by Francione would contain a substance which would produce a positive field test result but which would not, in fact, be an illegal narcotic substance.

Cir. 1980); *United States* v. *Williamson*, 482 F.2d 508 (5th Cir. 1973); *United States* v. *Lee*, 428 F.2d 917 (6th Cir. 1970), *cert. denied*, 404 U.S. 1017 (1972); *Wangrow* v. *United States*, 399 F.2d 106 (8th Cir.), *cert. denied*, 393 U.S. 933 (1968).

Other courts, while recognizing the inherent Fifth Amendment considerations, have simply incorporated them as an element to be balanced under Rule 14. The leading proponent of this analysis has been the Court of Appeals for the District of Columbia, which formulated its rule in *Baker* v. *United States*, 401 F.2d 958, 977 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970), which pronouncement remains the cornerstone of subsequent jurisprudence in this area:

> [N]o need for severance exists until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other. In making such a showing, it is essential that the defendant present enough information — regarding the nature of the testimony he wishes to give on one count and his reasons for not wishing to testify on the other — to satisfy the court that the claim of prejudice is genuine and to enable it intelligently to weigh the considerations of 'economy and expedition in judicial administration' against the defendant's interest in having a free choice with respect to testifying.

See, e.g., *United States* v. *Valentine*, 706 F.2d 282 (10th Cir. 1983); *United States* v. *Jamar*, 561 F.2d 1103, 1108 n.9 (4th Cir. 1977); *Bradley* v. *United States*, 433 F.2d 1113, 1122 (D.C. Cir. 1969); *Cross* v. *United States*, 335 F.2d 987, 989 (D.C. Cir. 1964).

Many courts consider the *Baker* analysis dispositive even of Fifth Amendment claims made independently of Rule 14

severance claims. See, e.g., *United States* v. *Armstrong*, 621 F.2d 951 (9th Cir. 1980); *Alvarez* v. *Wainwright*, 607 F.2d 683, 685 n.2 (5th Cir. 1979); *Holmes* v. *Gray*, 526 F.2d 622, 626 (7th Cir. 1975), *cert. denied*, 434 U.S. 907 (1977); *United States ex rel. Tarallo* v. *LaVallee*, 433 F.2d 4, 5 (2d Cir. 1970), *cert. denied*, 403 U.S. 919 (1971).

Only one court has analytically distinguished the right to be free from compulsory self-incrimination from the question of prejudicial joinder in this context. *United States* v. *Weber*, 437 F.2d 327 (3d Cir. 1970), *cert. denied*, 402 U.S. 932 (1971). The *Weber* court subjected the Fifth Amendment question to independent scrutiny, properly recognizing that no mere balancing of equities may dispose of the constitutional protections at issue.

The Court of Appeals for the Second Circuit disposed summarily of petitioner's claim on the basis that there was no abuse of discretion in the denial of severance and, in any event, joint trial did not prejudice defendant. See Appendix at 4a. This conclusion is patently erroneous: not only is it based upon an improper standard, one which utterly ignores the substantial Fifth Amendment interests at stake, but furthermore it is invalid even assuming the propriety of subjecting such a fundamental constitutional protection to a Rule 14 balancing inquiry.

Petitioner was caught between the Scylla of relinquishing his right to testify in his own behalf, see *United States* v. *Bentvena*, 319 F.2d 916, 942-44 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963), and the Charybdis of forfeiting his Fifth Amendment protection. Cf. *Harrison* v. *United States*, 392 U.S. 219, 222 (1968). Unlike the situation in most of the cases which have considered this issue, Napoli did not have an "unfettered choice," *Williams* v. *Florida*, 399 U.S. 78 (1970), between testifying on the money counts or remaining silent. See, e.g., *United States* v. *Weber*, 437 F.2d at 335 (defendant free to remain silent on count to which he contended pretrial

he did not wish to testify; strategic decision that best chance of acquittal involved denial of involvement in both extortion schemes as opposed to selective denial of one and silence on other). Cf. *Holmes* v. *Gray*, 526 F.2d at 626. Rather, the circumstances here mandated testimony inculpating Napoli on the money counts in the course of presenting his defense to the jury. Negation of the intent and knowledge elements of the narcotics charges necessarily required an admission of an intent to permanently deprive "Danny" of his money. While the inextricably interwoven nature of the offenses charged might well militate against the granting of a Rule 14 motion not implicating the privilege, in a case such as petitioner's, the particular concatenation of circumstances eliminates even the theoretical possibility of presenting his evidence as to the narcotics counts and remaining silent as to the money counts, assuming the risk of an adverse inference from his silence on one count which could only be exacerbated by testimony on the other. See, e.g., *Cross* v. *United States*, 335 F.2d at 989 & n.5. Even this unenviable alternative was denied petitioner. Furthermore, petitioner's defense to the narcotics counts was not one which was susceptible to presentation through other witnesses, thus ameliorating the Fifth Amendment conundrum. See, e.g., *United States* v. *Reicherter*, 647 F.2d at 401 (alibi). Cf. *Williams* v. *Florida*, 399 U.S. 78 (1970). Under all the circumstances of this case, petitioner's inculpatory testimony on the § 641 counts was compelled within the meaning of the Fifth Amendment.

Even if this issue is capable of resolution within the parameters of Rule 14 and the *Baker-Cross* analysis, severance should have been granted. Petitioner repeatedly and vigorously delineated for the trial judge the importance of the testimony that he wished to offer on the narcotics counts and the compelling need not to present that testimony at a joint trial, unlike most of the cases which have applied the *Baker* standard. See, e.g.,

United States v. *Valentine*, 706 F.2d at 291; *United States* v. *Werner*, *supra*; *United States* v. *Reicherter*, *supra*; *United States ex rel. Tarallo* v. *LaVallee*, *supra*; *United States* v. *Armstrong*, *supra*.[7]

Petitioner's testimony relative to the narcotics counts necessarily encompassed an effective admission of all the elements of the § 641 offense except for the ownership of the monies in question by the United States government. The prejudice flowing therefrom cannot be doubted;[8] while judicial economy is a serious consideration in severance determinations, "[n]evertheless, a single joint trial, however desirable from the point of view of efficient and expeditious criminal adjudication, may not be had at the expense of a defendant's right to a fundamentally fair trial." *United States* v. *Echeles*, 352 F.2d 892, 896 (7th Cir. 1965). In Napoli's case, while separate trials would necessarily produce some duplication of proof, the evidence at the separate trials would be by no means congruent; indeed, proof which consumed substantial portions of trial time (e.g., the provenance of the monies or the accuracy of field-testing) would not require repeat performance.

Only a separate trial of the § 641 counts which preceded trial of the narcotics counts could alleviate the overwhelming prejudice inherent in this joint trial. The trial judge had the power to dictate the precedence of the separate trials. See, e.g.,

---

[7] Furthermore, the testimony offered was not merely cumulative, see, e.g., *United States* v. *Valentine*, *supra*, nor is there any reason to believe that petitioner would not in fact have remained silent at a separate trial of the § 641 offenses, see, e.g., *Baker* v. *United States*, 401 F.2d at 977.

[8] In addition, in a separate trial of the § 641 counts, Napoli would obviously not have embarked upon the slippery slope of calling co-defendant Guglielmini as a witness to substantiate his contention that no drug transaction was intended, providing the prosecutor the opportunity to impeach Guglielmini with his guilty plea to the § 641 count of the very indictment at trial, an event of immense prejudicial impact.

Byrd v. *Wainwright*, 428 F.2d 1017 (5th Cir. 1970); *United States* v. *Echeles*, 352 F.2d at 898. Cf. *Bruton* v. *United States*, 391 U.S. 123 (1968). Preservation of the fundamental privilege against self-incrimination demanded such resolution here.

II. Deception and Disguise Practiced by the Undercover D.E.A. Agent Compel the Conclusion that There Was No Federal Jurisdiction of this Offense Absent Proof of Defendant's Actual Knowledge that the Monies in Question Were the Property of the United States Government.

This Court has never examined the question of whether, and to what extent, knowledge of the governmental ownership of the monies or property in question is an element of the offense under 18 U.S.C. § 641.[9] There is, admittedly, a general consensus among the circuits that such knowledge is not an element of the offense. See, e.g., *United States* v. *Hamilton*, 726 F.2d 317 (7th Cir. 1984); *United States* v. *Baker*, 693 F.2d 183 (D.C. Cir. 1982); *United States* v. *Speir*, 564 F.2d 934 (10th Cir. 1977), *cert. denied*, 435 U.S. 927 (1978); *United States* v. *Jermendy*, 544 F.2d 640 (2d Cir. 1976), *cert. denied*, 430 U.S. 909 (1977); *United States* v. *Crutchley*, 502 F.2d 1195 (3d Cir. 1974); *United States* v. *Denmon*, 483 F.2d 1093 (8th Cir. 1973); *United States* v. *Boyd*, 446 F.2d 1267 (5th Cir. 1971); *United States* v. *Howey*, 427 F.2d 1017 (9th Cir. 1970).[10] These cases are most noteworthy for their utter

[9] In *Morissette* v. *United States*, 342 U.S. 246 (1952), this Court held that specific intent is an element of the § 641 offense.

[10] Many of these cases simply adopted the holding of the Ninth Circuit in *Howey*. *Howey* rested upon the superficially compelling analogy to the common law definition of larceny, which does not require proof that the defendant knew precisely to

lack of thoughtful analysis, glibly dismissing the question on the ground that government ownership provided the jurisdictional basis for the federal prosecution. However, the question is not simply whether a given requirement is jurisdictional but rather whether it is jurisdictional *only*. *United States* v. *Feola*, 420 U.S. 671, 676 n.9 (1975).

In *Feola*, while holding that knowledge that the assaultee was a federal officer was not an element of the offense under 18 U.S.C. § 111, this Court nonetheless refrained from making its pronouncement absolute, concluding rather that actual knowledge may in fact be relevant under some circumstances:

> The statute does require a criminal intent, and there may well be circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of *mens rea*. For example, where an officer fails to identify himself or his purpose, his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property. In a situation of that kind, one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent.

Id. at 686.

---

whom the property belonged; however, where the question is what interests of the federal government the statute was designed to protect or, conversely, what conduct falls within the ambit of the statute, the absence of such a specific knowledge requirement from the common law definition is analytically utterly irrelevant. Yet this is the touchstone upon which most of the circuits have founded their conclusions. The common law definition of assault is similarly silent as to knowledge of the identity of the victim, yet in *United States* v. *Feola*, this court engaged in a lengthy and careful analysis of whether the intent of 18 U.S.C. § 111 (making it a crime to assault a federal officer while in the performance of his duties) was to protect federal officers, in which case knowledge of identity would not be required, or federal functions, in which case knowledge would be required, or both.

Similarly, in *United States* v. *Yermian*, 104 S.Ct. 2936 (1984), holding that 18 U.S.C. § 1001 did not require proof of *actual* knowledge that the false statements at issue were made in a matter within the jurisdiction of a federal agency,[11] this Court proceeded on the assumption that some lesser culpability standard was required, declining to pass upon the propriety of the jury instructions that agency jurisdiction must have been reasonably foreseeable, on a "knew or should have known" standard. Compare *id.* at 2943 n.14 *with id.* at 2943-44 (Rehnquist, J. dissenting). Both *Feola* and *Yermian* leave open the question of the proper standard of culpability where it was not reasonably within the power of a defendant to discover the nexus between his conduct and the federal government which would bring his conduct within the purview of a specific federal criminal statute,[12] either because of the significant attenuation or, as in this case and as implicit in the language of *Feola*, quoted *supra*, because of illegality or deceit on the part of government agents.

---

[11] 18 U.S.C. § 1001 provides "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies . . . or makes any false, fictitious or fraudulent statements or representations . . .". That petitioner knew of the falsity of his statements was not in dispute in *Yermian*; similarly, matter printed on the forms on which the information was contained was sufficient to put a reasonably perceptive person on notice of the federal interest in the matter. The Court, parsing the statutory phraseology, apportioned the "knowingly and wilfully" language to the falsification element rather than the agency jurisdiction element. By contrast, the statute at issue in *Feola* provided simply "Whoever forcibly assaults . . . [a federal officer] while engaged in or on account of the performance of his official duties . . .".

[12] Another consistently distinguishing characteristic of the cases considering the knowledge requirement is the almost uniform existence of circumstances which would have supported conviction on a reasonable foreseeability standard, i.e., where the federal provenance of the property or monies would have been discernable. See, e.g., *United States* v. *Johnson*, 596 F.2d 842 (9th Cir. 1979); *United States* v. *Long*, 706 F.2d 1044 (9th Cir. 1983).

The purpose of § 641 is protection of federal property. Cf. *United States* v. *Sorrow*, 732 F.2d 176 (11th Cir. 1984). Any such interest becomes severely attenuated where federal agents not only deliberately place federal funds at risk but further create elaborate fictional guises to obscure the federal provenance of the funds.[13] There are apparently only two decisions of federal Courts of Appeals which have considered this issue. *United States* v. *Smith*, 489 F.2d 1330 (7th Cir. 1973), *cert. denied*, 416 U.S. 994 (1974); *United States* v. *Falco*, 478 F.2d 1376 (9th Cir. 1973). Both concerned classic "rip-off" situations in which the unwitting dupe was to be deprived of his purchase money without provision of the bargained for consideration, in *Smith*, narcotics, and in *Falco*, counterfeit currency. Defendants in both cases contended that the government conduct constituted entrapment, an argument misperceived by the courts as pertaining to inducement to commit the theft per se rather than pertaining to the federal element of the offense. The offenses here charged under § 641 were indisputably the product of the creative activity of law enforcement officials. See, e.g., *Sherman* v. *United States*, 356 U.S. 369, 372 (1958); *United States* v. *Jannotti*, 673 F.2d 578, 596-97 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982). Without the government's deceit and inducement, no crime cognizable under § 641 would have been committed.[14] See *United States* v. *Garrett*, 716 F.2d 257, 268-71 (5th Cir. 1983), *cert. denied*, 104 S.Ct. 1910 (1984); *United States* v. *Archer*, 486 F.2d 670

[13] With the exception of a handful of cases discussed further *infra*, prosecutions under § 641 have involved defendants who wrongfully removed government property or monies from their rightful repository or who received such property from one who had done so, a vastly different scenario from one in which government agents insinuate government funds into the stream of commerce, both encouraging takers and discouraging inquiry.

[14] Indeed, had circumstances been as they appeared, both state and federal law enforcement authorities would undoubtedly have been utterly indifferent to the pecuniary aspects of the transaction.

(2d Cir. 1973). With respect to analogous claims of manufactured jurisdiction under the Travel Act, the Second Circuit in *Archer* held that:

> [W]hen the federal element in a prosecution under the Travel Act is furnished solely by undercover agents, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves.

Id. at 685-686. Similarly, it is a far different situation where a defendant has acted with either actual imputed knowledge of the federal interest or with reckless disregard of potential federal interests in the matter than where, as here, disguise and deception were practiced intentionally by federal agents for the specific purpose of ensuring that the defendant could not and would not ascertain the federal involvement in the matter. Where it has provided the carrot in this fashion, fairness and due process of law demand that the government be denied the use of the stick.

Conclusion.

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MARTIN G. WEINBERG,
Counsel of Record,
KIMBERLY HOMAN,
OTERI, WEINBERG & LAWSON,
75 Blossom Court,
Boston, Massachusetts 02114.
(617) 227-3700

Appendix.

Table of Contents.

United States Court of Appeals for the Second Circuit.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 29th day of August one thousand nine hundred and eighty-four.

UNITED STATES OF AMERICA,
Appellee,
v.
JOHN NAPOLI,
Defendant-Appellant.

No. 84-1053

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellant, John Napoli,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith,
Clerk

United States Court of Appeals for the Second Circuit.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of July one thousand nine hundred and eighty-four.

Present: HONORABLE WALTER R. MANSFIELD,
HONORABLE THOMAS J. MESKILL,
HONORABLE RICHARD J. CARDAMONE,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,
v.
JOHN NAPOLI,
Defendant-Appellant.

Docket No. 84-1053

This is an appeal from a judgment entered on a jury verdict by the United States District Court for the Eastern District of New York, McLaughlin, *J.* Napoli was convicted of receiving stolen government money under 18 U.S.C. § 641 (1982), distributing heroin under 21 U.S.C. § 841(a)(1) (1982), and conspiracy to commit the above substantive offenses under 18 U.S.C. § 371 (1982) and 21 U.S.C. § 846 (1982).

This cause came on to be heard on the transcript of record from said district court and was taken on submission.

The judgment of the district court is AFFIRMED.

Giving proper deference to the district court's credibility determinations, *see* Tr. at 100, we cannot conclude that the district court clearly erred in crediting the government's testimony. Thus, we accept the findings that Agent Rakowsky properly read appellant his *Miranda* rights and that appellant did not ask to call his attorney prior to making a statement to Agent Johnson.

Under the totality of the circumstances, *see United States* v. *Vera*, 701 F.2d 1349, 1364 (11th Cir. 1983), we hold that the district court did not clearly err in holding that appellant knowingly, intelligently and voluntarily waived his *Miranda* rights when he chose to cooperate with Agent Johnson. *See United States* v. *Rubio*, 709 F.2d 146, 153 (2d Cir. 1983). Immediately after appellant agreed to talk to Johnson and asked him what he wanted to know, Johnson ascertained that appellant had been advised of his *Miranda* rights and that he understood them. Tr. at 44. The district court found that appellant had been arrested at least seven or eight times previously, Tr. at 100, and appellant evidently had been read his rights on at least ten occasions, Tr. at 76. The record supports the district court's conclusion that appellant understood his rights and voluntarily waived them.

The district court did not clearly err in finding that the atmosphere in the DEA office was not oppressive, Tr. at 100, and that appellant's statements to Johnson were not the product of coercion. Agent Johnson's question to appellant regarding whether he wanted to cooperate, Tr. at 43, was not a form of interrogation under *Miranda*. *See United States* v. *Guido*, 704 F.2d 675, 677 (2d Cir. 1983). Because Johnson did not begin to interrogate appellant at that time, there was no need for fresh *Miranda* warnings. Johnson was free to answer appellant's questions regarding cooperation and did so in a "back and forth" discussion in which appellant was evidently an active participant. *See* Tr. at 43-44. After this dialogue, appellant

indicated to Johnson that he would talk to him and invited questioning by asking Johnson what he wanted to know. Tr. at 44. Because appellant freely offered to cooperate and because he was well aware of his *Miranda* rights at the time he did so, the district court did not err in finding that there was no coercion.

Appellant's other contentions are also meritless.

(1) The DEA Form 12s are not like the lab reports in *United States* v. *Oates*, 560 F.2d 45 (2d Cir. 1977), but are routine reports based on routine procedures. Agent West provided testimony suggesting that the documents were reliable and that was sufficient for their admission. *See, e.g., Itel Capital Corp.* v. *Cups Coal Co.*, 707 F.2d 1253, 1259-60 (11th Cir. 1983). (2) There was no abuse of discretion in denying a severance and the denial of the severance did not prejudice appellant. *See United States* v. *Lyles*, 593 F.2d 182, 189-90 (2d Cir.), *cert. denied*, 440 U.S. 975 (1979). (3) The government's evidence that appellant knew the money was stolen went to the essence of the crimes with which he was charged and was not "similar act" evidence. (4) Frank Guglielmini's testimony was relevant for impeachment purposes, *United States* v. *Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982), and was not contrary to the district court's ruling. In any event, appellant does not claim that he asked for a cautionary instruction; thus, under Fed. R. Evid. 105, the trial court was not obligated to give one. (5) Finally, appellant need not have known the jurisdictional fact that the money belonged to the United States in order to be convicted of receiving stolen money belonging to the United States. *United States* v. *Jermendy*, 544 F.2d 640, 641 (2d Cir. 1976) (per curiam), *cert. denied*, 430 U.S. 909 (1977); *cf. United States* v. *Yermian*, 52 U.S.L.W. 4922 (U.S. June 27, 1984) (false statements to government agency).

Walter R. Mansfield, U.S.C.J.
Thomas J. Meskill, U.S.C.J.
Richard J. Cardamone, U.S.C.J.